

Memorandum

To: Honorable Jerome E. Horton, Chairman
Honorable Michelle Steel, Vice Chair
Honorable Betty T. Yee, First District
Senator George Runner, Second District
Honorable John Chiang, State Controller

Date: October 12, 2012

From: Randy Ferris
Chief Counsel



Subject: Board Meeting, October 23-25, 2012
Chief Counsel Matters – Item J – Rulemaking
Adoption of Emergency Regulation – Lumber Products Assessment

We request your approval and adoption of attached emergency Regulation 2000, *Retailer Reimbursement Retention*, related to the new Lumber Products Assessment. Staff recommends the new regulation be codified in title 18 of the California Code of Regulations, division 2 State Board of Equalization – Business Taxes, new chapter 4.1, Lumber Products Assessment.

Assembly Bill (AB) 1492 (Chapter 289, statutes 2012) imposes, beginning January 1, 2013, a one-percent assessment on purchasers of lumber products and engineered wood products to be collected by the retailer at the time of sale. As enacted by AB 1492, Public Resources Code (PRC) section 4629.5, subdivision (a)(3) authorizes the Board of Equalization to adopt emergency regulations pursuant to Government Code section 11346.1 to determine the amount of reimbursement retailers may retain related to certain compliance costs associated with the commencement of their collection duties on January 1, 2013. Specifically, PRC section 4629.5, subdivision (a)(3), in relevant part, provides:

The retailer shall collect the assessment from the person [i.e., purchaser] at the time of sale, and may retain an amount equal to the amount of reimbursement, as determined by the State Board of Equalization pursuant to regulations, for any costs associated with the collection of the assessment, to be taken on the first return or next consecutive returns until the entire reimbursement amount is retained.

As to legislative history, both the pertinent Senate and Assembly floor analyses refer to retailers being reimbursed for “costs to set up collection systems.”

Thus, both the plain language of PRC section 4629.5, subdivision (a)(3) and the available information regarding legislative intent, support an interpretation that AB 1492 provides for affected retailers to retain a one-time amount, as specifically determined by the Board, for reimbursement of costs to set up collection systems prior to January 1, 2013. The retention of the Board-specified reimbursement amount to cover initial startup costs must be reflected on the first returns due after the Lumber Products Assessment becomes operative on January 1, 2013. If the entire specified amount is not retained on the first return due after January 1, 2013, the remainder must be retained on the next consecutive returns until the entire specified amount is retained.

It is particularly noteworthy that the Board was given authority to determine the amount of reimbursement affected retailers may retain. The Board was not given the authority to define the costs associated with compliance so that each affected retailer could come up with its own unique reimbursement amount. Moreover, the reimbursement amount determined by the Board may be retained by affected retailers without any requirement that the retailers substantiate their costs. In short, nothing in the plain language of PRC section 4629.5, subdivision (a)(3) or the public legislative history demonstrates that the intent of AB 1492 was to enable affected retailers to be reimbursed for actual costs or for costs on an ongoing basis (i.e., costs beyond initial set-up costs as determined by the Board). Further legislative action would be required to provide for reimbursement of actual costs or for ongoing costs of compliance.

The attached proposed regulation provides that retailers, as of January 1, 2013, may retain collected assessment amounts of \$250 per location as reimbursement for one-time, startup costs associated with the collection of the assessment (i.e., for the costs to set up collection systems). The \$250 reimbursement amount reflects an average cost using U.S. Census Bureau data and a 2006 PricewaterhouseCoopers LLP report (Report).¹ The Report was commissioned by a public-private partnership known as the Joint Cost of Collection Study and analyzes a large-scale survey that was conducted to develop the first national measure of sales tax compliance costs. The Report shows that, in 2003 (a time during which many retailers had compliance costs associated with rate and base changes under the Streamlined Sales and Use Tax Agreement), gross retail sales tax compliance costs for programming and servicing cash registers were reflected by a weighted average cost of 0.01 percent of taxable sales.² The \$250 amount was calculated by multiplying 0.01 percent by \$2,500,000.³ The \$2,500,000 figure was chosen because about 50 percent of lumber retail establishments in 2007 had sales of \$2,500,000 or less. Staff believes this data provides an objective foundation for determining that a reimbursement of \$250 per location reasonably estimates the average startup costs for retail lumber establishments that must start collecting the assessment on January 1, 2013 (i.e., the costs to set up collection systems).

While not directly relevant, as additional comparison, staff looked at the reimbursement amounts retained by retailers under the Covered Electronic Waste Recycling Fee Law and the

¹ *Retail Sales Tax Compliance Costs: A National Estimate, Volume One: Main Report*, PricewaterhouseCoopers LLP, Prepared for Joint Cost of Collection Study, National Economic Consulting, April 7, 2006. (http://www.streamlinedsalestax.org/uploads/downloads/JCCS_Part_I_Final_Report_Vol_I_20060407.pdf)

² See footnote 1, Report, Table V.B.1b ("Gross Compliance Costs by Type and Size of Annual Retail Sales, 2003 [As a percentage of total taxable sales]"), at p. 13.

³ 2007 *Economic Census, Retail Trade*, U.S. Census Bureau.

California Tire Fee Law (under those programs retailers are allowed to retain 3 percent and 1.5 percent of the fee, respectively, as reimbursement of collection costs). (See PRC, §§ 42464, subd. (c)(1), 42885, (b)(3).) We note that, in contrast to the Lumber Products Assessment program under present consideration, these programs illustrate the kind of language the Legislature uses when it intends to provide for ongoing vendor compensation. Staff has determined that, for the e-waste and tire fees, the average annual reimbursement was \$244 per feepayer in fiscal year 2010-11 (total reimbursement amount retained by feepayers divided by the number of feepayers). While compliance costs for these programs are reimbursed per retailer (not per location) and on an ongoing basis (not a one-time, startup basis), we note that average reimbursement amounts for these programs are generally consistent with, and could potentially be viewed as providing additional support for, the proposed \$250 reimbursement amount for the Lumber Products Assessment program.

Emergency regulations approved by the Office of Administrative Law (OAL) are effective on the date they are initially filed with OAL, and approved emergency regulations remain effective for 180 days unless OAL approves a re-adoption of the emergency regulation during that time period. OAL may approve two re-adoptions of the same emergency regulation and each re-adoption may extend the emergency regulation's effective period for up to 90 days. Emergency regulations are repealed when their effective periods expire. However, an emergency regulation can become permanent if the Board re-adopts the regulation through the regular rulemaking process during the period the emergency regulation is in effect. Therefore, staff recommends the Board begin regular rulemaking by authorizing staff to also publish Regulation 2000 in accordance with the regular rulemaking process so that the Board can subsequently adopt Regulation 2000 as a permanent regulation after the normal notice and comment period. Comments from interested parties would be heard and considered when the public hearing for the regulation is held.

Staff recommends that the Board approve and adopt the proposed emergency regulation at the October Board meeting to ensure that a Board-determined reimbursement amount will be duly authorized before the affected retailers' collection duties begin on January 1, 2013. In the event that future public comment or substantiating documentation from affected retailers provide a persuasive basis for reconsideration of the one-time reimbursement amount determined by the Board, such reconsideration is allowed pursuant to the regular rulemaking process staff is also recommending that the Board initiate. The Board also has the authority to amend any emergency regulation it may promulgate. (Gov. Code, § 11346.1.)

If you have any questions, please feel free to contact me.

Approved:


Cynthia Bridges
Executive Director

RF:kbs:yg

Attachment: Regulation 2000, *Retailer Reimbursement Retention*

cc: Ms. Cynthia Bridges MIC:73
Mr. Robert Tucker MIC:82
Mr. Kevin Smith MIC:82
Mr. Robert Ingenito MIC:67
Mr. Bill Benson MIC:67
Mr. Joe Fitz MIC:67
Mr. Jeffrey McGuire MIC:43
Ms. Susanne Buehler MIC:92

Regulation 2000, *Retailer Reimbursement Retention*

Public Resources Code section 4629.5, as added by Statutes 2012, chapter 289, requires the Board of Equalization to adopt a regulation to determine the amount of reimbursement a retailer may retain for costs associated with the collection of the Lumber Products Assessment imposed by Public Resources Code section 4629.5.

A retailer required to collect the Lumber Products Assessment may retain \$250 per location as reimbursement for startup costs associated with the collection of the assessment. Such reimbursement is to be taken on the retailer's first return on which the Lumber Products Assessment is reported or, if the amount of the collected assessment is less than the allowed reimbursement, on the retailer's next consecutive returns until the allowed reimbursement amount is retained.

"Location" means and is limited to a business location registered under the retailer's seller's permit as of January 1, 2013, where sales of products subject to the assessment are made.

Note: Authority cited: Section 4629.5, Public Resources Code. Reference: Section 4629.5, Public Resources Code.